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In The

# Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CONNECTICUT; DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF CONNECTICUT; DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT; ELISHA C. FREEDMAN, Individually And In His Official Capacity; AND EDWARD W. MAHER, Individually And In His Official Capacity,
*Petitioners,*

V.

WINNIE TEAL, DAVID MALSTROM, MARIAN COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JENNIE PICK AND LINDA BROOKS,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF RESPONDENT

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## QUESTION PRESENTED

In a Title VII action in which the final outcome of the employee selection process does not result in an adverse impact against the plaintiffs' minority group, can the plaintiffs make a *prima facie* showing of employment discrimination by merely establishing: (1) that they failed to succeed on a component of the selection process and thereby become ineligible to proceed further in the selection process and (2) that the results of such component had a disparate impact on plaintiffs' minority group?

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## STATEMENT OF THE CASE

The respondents in this action are employees of the State of Connecticut who have worked in various positions within the State's Department of Income Maintenance for periods in excess of eight years. At the time this action was instituted, and for almost two years prior thereto, the respondents were successfully serving on a provisional basis in the positions of "Welfare Eligibility Technician Supervisors." Several of their superiors testified at trial that the respondents possessed the qualifications for permanent appointment as supervisors and praised their performance on the job.

The issue now before the Court arises from the claim of the black respondents, Winnie Teal, Gracie Clack, Rose Walker and Edith Latney, concerning the written examination used by the petitioners to screen candidates for promotion on a permanent basis to the positions of "Welfare Eligibility Technican Supervisor." The black respondents claimed that they were eliminated from consideration for promotion to these positions solely on the basis of the results of a written examination that discriminated against black candidates. This, they argued, constituted a violation of the provisions of Title VII of the Civil Rights Act of 1964, as amended. (Title 42 U.S.C. Section 2000e et seq.)[1]

The examination was administered on December 2, 1978 to 329 candidates. The mean score of the candidates taking the test was 70.4%. The black candidates, however, had a mean score 6.7 percentage points lower than white candidates, a disparity that the petitioners admitted was statistically significant. It was only after the individual tests of the candidates had been corrected and graded that the petitioners established a cut-off score

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[1] In bringing this suit, the black respondents were joined by four white plaintiffs who together claimed that the test in question violated provisions of state law which require promotional examinations to be job related.

to determine eligibility for promotion. No effort, what-so-ever, had previously been made by the petitioners to identify an appropriate cut-off score for this test. Even though knowing beforehand, that a cut-off score of 65 would eliminate from promotional eligibility a disproportionately large number of black candidates, the petitioners, nevertheless, set the score at 65. This score, the petitioners claimed, was set at a lower level than that suggested by the test statistics, but was used in an attempt to lessen the severity of the disparate racial impact had a higher cut-off score been used.

The test results, broken down by race, with the cut-off score set at 65 were as follows:

| Candidate Group | No. taking test | No. Passing test | Percent passing test |
|---|---|---|---|
| Black | 48 | 26 | 54.17 |
| Hispanic | 4 | 3 | 75.00 |
| Indian | 3 | 2 | 66.67 |
| White | 259 | 206 | 79.53 |
| Unidentified | 15 | 9 | 60.00 |
| | 329 | 246 | 74.77 |

These results revealed that the passing rate of the identified black candidates (54.17%) was approximately 68 percent that of the passing rate of the identified white candidates (79.53%). This disparity in the passing rates between black candidates and white candidates was of statistical significance. (Tr. 351-A, 352, (May 28, 1980)). In addition, the disparity in passing rates was violative of the four-fifths rule established by the Uniform Guidelines on Employee Selection Procedures, Title 29 C.F.R. Section 1607.4(d) (1979) for assessing adverse impact.

In determining eligibility for promotion pursuant to Connecticut's merit system, candidates who fail to achieve a passing grade are eliminated from all consideration for appointment. Those who attain a passing grade are ranked on an eligibility list in the order of their scores on the test. Candidates achieving the same point score are assigned the same rank. The State is then

allowed to choose for promotion from the candidates whose scores on the examination fall within a specified number of ranks. The number of ranks from which the State is allowed to choose varies in relation to the number of promotions to be made. This number of ranks is determined by adding four to the total number of vacancies to be filled. Those candidates falling within the number of ranks determined in this manner form an eligibility pool from which the petitioners, in their discretion, select candidates to fill the permanent positions.

In the present case, there were forty-six vacancies to be filled by promotion. Under State law, therefore, the petitioners, theoretically, could have chosen for promotion any candidate whose score placed him or her within the fifty highest ranks. However, because the scores of all the candidates were grouped into twenty-five ranks, the petitioners were permitted to choose for promotion from any of the passing candidates. Thus, all the candidates passing the test were eligible for promotion on an equal basis with each other, there being no requirement that appointments be made according to the rank order of the candidates. As acknowledged by the petitioners, the results of the test were used on a pass-fail basis. (Tr. 248, 249 (May 27, 1980); Tr. 314, 315, 355, 356 (May 28, 1980)).

Upon being informed that they had failed to attain a passing grade, and were thus not eligible for promotion, the respondents commenced the instant action in the Federal District Court for the District of Connecticut on April 6, 1979. Prior to bringing the action in Court, the respondents also filed administrative complaints with the State of Connecticut Commission on Human Rights and Opportunities and the United States Equal Employment Opportunity Commission. They sought immediate relief from the Court in the form of a temporary restraining order to forestall their removal from the positions of Welfare Eligibility Technician Supervisors, in which they had been serving on a provisional basis. As a result of petitioners' representation that they would not remove the respondents from their provisional positions prior to a decision on the merits of the respondents' complaint, this request for temporary relief was never

acted upon by the District Court. No order was ever entered, and no agreement was ever reached, that prevented the petitioners from making permanent appointments to the other 46 or more positions. However, it was more than a year after this action was instituted, and approximately one month prior to trial, that the petitioners made their first promotions from the eligibility list generated by the written exam. Forty-six persons were promoted to permanent supervisory positions, 11 of whom were black and 35 of whom were white. Of the 48 identified black candidates who entered the selection process, 11 or approximately 33 percent, were promoted; of the 259 identified white candidates who applied, 35, or about 13.5 percent, were promoted. Thus, the actual promotion rate of blacks (23 percent) was approximately 170 percent that of the actual promotion rate (13.5 percent) of identified whites. Further, although black candidates comprised only 11 percent of the pool of eligible candidates formed from the results of the test, they made up, as a group, 24 percent of the final appointments, or more than twice their incidence in the eligibility pool would have statistically commanded. Forty-two percent of the eligible black candidates received final appointments as compared to seventeen percent of the eligible white candidates.

At trial and before the Court of Appeals, the petitioners claimed that in making the final appointments from the pool of eligible candidates they considered the past work performance of the candidates, recommendations of the candidates' supervisors, and to a lesser degree, the candidates' seniority. Although petitioners now state for the first time that ranking on the eligibility list as well as interest in the geographical area where the vacancies existed were also considered (Pet. Br. P. 3) there was no evidence presented at trial in support of these claims. As regards rank on the eligibility list, the facts show that the opposite is true. Once the list of eligible candidates was compiled, the rank order of the candidates on that list was no longer pertinent. Since the examination was, in effect, a pass-fail device, all candidates who passed the test presumably had an equal chance for selection. (Tr. 248, 249 (May 27, 1980); Tr. 314, 315, 355, 356, May 28, 1980)).

Additionally, in the final step of the promotional process, the petitioners again argued to both the District Court and the Court of Appeals that they utilized an affirmative action program to insure a large representation of minority candidates in the supervisory employment sphere. At page 16 of their brief to the District Court, which was repeated verbatim at page 9 of their brief to the Court of Appeals, the petitioners stated, in no uncertain terms, that,

> "Evidence presented at trial established that the examination given was only one component of the defendants' total selection process. Defendants also utilized an affirmative action program to insure a large representation of minority candidates in the supervisory employment sphere. The past work performance of candidates who passed the exam was considered, as well as recommendations from their supervisors, and to a lesser degree, the length of the candidates' services. Thus, the total selection process involved four components the written exam being just one."

Testimony to that effect was also given at trial. (Tr. 239, 248 (May 27, 1980)).

Now, before this Court, the petitioners, at Page 4, fn. 1 of their brief, take exception to the Court of Appeals statement that the petitioners employed an affirmative action program "to insure a large representation of minority candidates on the supervisory level." They further claim, for the first time, that the final appointments were made without regard for race or color. Petitioners' arguments to the District Court and the Court of Appeals, the testimony at trial concerning the permanent appointments, as well as the racial composition of the appointments themselves, clearly indicate that the appointments were made with an awareness of the candidates' race and color.

## SUMMARY OF ARGUMENT

There is no dispute that the examination used by the petitioners to screen candidates for promotion to the positions of Welfare Eligibility Supervisor eliminated a disproportionate number of black candidates, including the respondents, from promotional consideration. As such, there exists no justification for using the results of this test in making employment decisions unless it is first proven to be job-related.

That the petitioners, in making promotions to the positions in question, appointed a greater percentage of black candidates than their incidence in the pool of eligible candidates would statistically command, does not negate the fact that the pool of eligible candidates, from which the appointments were made, was formed solely on the basis of the results of an examination that disproportionately excluded black candidates. The disproportionate selection of black candidates for permanent appointments from those black candidates who gained entry into the pool of eligible candidates by overcoming the discriminatory effects of the test does not remedy the disproportionate exclusion of black candidates from the eligibility pool in the first instance. Regardless of the number of black candidates finally being appointed by the petitioners, it remains undisputed that the respondents were denied entry into the pool of eligible candidates, and thus deprived of a promotional opportunity, solely on the basis of an examination that discriminated against black candidates. They remain the victims of racial discrimination whether or not the final selections evidence adverse impact.

The only justification advanced by the petitioners for using the results of this examination without first establishing its job-relatedness, is that in making appointments from the pool of eligible candidates, they selected sufficient numbers of black candidates from that pool so as to offset the disparate impact the examination had on black candidates. But this does nothing to redress the injury that the respondents would suffer in light of the test's disparate impact on black candidates, if, in fact, the test was unrelated to performance on the job, as is claimed

by the respondents. To adopt the position advanced by the petitioners, the Court would be sanctioning a practice that would permit an employer to screen candidates for promotion through the use of a discriminatory selection process, unrelated to job performance, if from those candidates who are fortunate enough to pass through that process, the employer weights its final promotional decisions so as to offset the purely numerical disparate impact of the screening device. Title VII of the Civil Rights Act of 1964, as amended, has not been and should not now be accorded such an interpretation.

Even if under a hypothetical set of circumstances the so-called "bottom line" defense possesses theoretical validity, it has no application to the facts of the present case. As noted, the selection process employed by the petitioners to determine eligibility for promotion consisted of a single component, the examination in question. Based on the results of the examination, a list of eligibles was compiled. From that list, the petitioners in their discretion, made selections. There was no other component or other tests that further screened the candidates who passed the exam in question. This case does not involve a selection process consisting of various sub-tests or components. Simply stated, concern about fragmenting a selection process into its various components or sub-tests is not present in this instant case.

Although they argued before both the District Court and the Court of Appeals that they employed an affirmative action program to insure a large number of minority candidates in supervisory positions, the petitioners, before this Court, retreat from that position and claim, instead, that appointments were made without reference to an individual's color or race. What should be apparent to the Court is that the petitioners played a numbers game on the eve of trial and — with an eye to the candidates' color — made the appointments they did, not in keeping with any affirmative action program, but simply in an effort to avoid liability to the respondents and circumvent the requirements of Title VII.

Also dictating against the recognition of a bottom line defense is the fact that the petitioners knew full well when they established a cut-off score for this examination that it adversely impacted upon black candidates. They selected a cut-off score, not before nor even at the time the test was held, but only after the individual candidates' tests had been graded and scored. In the least, the petitioners, having chosen a cut-off score that they knew beforehand would adversely impact upon black candidates, should be required to establish the job-relatedness or business necessity of that score.

For the first time before this Court, the petitioners claim that their actions have a cloak of immunity since the examination was administered as part of a bona fide merit system without intention to discriminate. Not having raised this issue either before the District Court, the Court of Appeals, or in their Petition for Certiorari, the petitioners are foreclosed from raising it. But assuming that at this late date, petitioners may raise this claim, it affords them no relief from liability since an examination which is not job-related and adversely impacts on black candidates, cannot be considered a part of a "bona fide" merit system.

## ARGUMENT

### I.

### THE BLACK RESPONDENTS ESTABLISHED A PRIMA FACIE CASE OF RACIAL DISCRIMINATION IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED.

#### A. A Prima Facie Case Of Racial Discrimination In Violation Of Title VII Is Established By Proving That The Results Of A Promotional Examination Adversely Impacts Upon Black Candidates.

A disparate impact analysis is the proper method for evaluating the legal validity under Title VII of employment practices that are facially neutral in their treatment of different groups of individuals, but that in fact fall more harshly on one group than another. *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 335, 336, fn. 15 (1977). Under this approach, the plaintiff is first required to establish a prima facie case on the basis of disparate impact, and then the defendant is required to rebut the plaintiff's case by proving that the disparity results from legitimate, job-related selection procedures. Proof of discriminatory motive is not required.

> "...Congress 'proscribed not only overt discrimination but also practices that are fair in form, but discriminatory in operation'...Thus the Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group..." *Teamsters,* supra at p. 349. (Citations omitted).

In order to establish a prima facie case under a disparate impact analysis, the plaintiff must prove "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants."

*Albemarle Paper Company* v. *Moody,* 422 U.S. 405, 425, (1975).

### B. The Respondents Proved That They Were Excluded From A Promotional Eligibility Pool Due Solely To The Results Of An Examination That Had A Disparate Impact Adversely Affecting Black Candidates.

To qualify for appointment to the promotional position of Welfare Eligibility Technician Supervisor, candidates were required to pass a written examination. Those candidates who passed the examination formed an eligibility pool from which the petitioners were allowed, under state law, to select candidates for appointment. On the other hand, those candidates who failed the examination were excluded from the eligibility pool and thus eliminated from promotional consideration. The examination acted as a pass-fail barrier beyond which failing candidates were not permitted to proceed.

There exists no dispute over the fact that the examination in this case produced a disparate impact adversely affecting black candidates. As both the District Court and the Court of Appeals found, the black respondents were eliminated from the promotional eligibility pool solely as a result of an examination that disproportionately excluded black candidates. Thus, under a disparate impact analysis, a prima facie violation of Title VII was established, leaving the petitioners the burden of proving the test's job-relatedness.

### C. The Same Considerations That Led The Supreme Court To Hold The Tests In *Griggs* To Be Discriminatory Are Present With Respect To The Examination Used By Petitioners In This Case.

As Justice Powell stated in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 806 (1973),

> "*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives."

Petitioners claim that these concerns are not present in this case. They argue that "Connecticut, like many other states, has never had a dual system as to which it could be said that the education of blacks was, on account of their race, inferior and culturally deprived." (Pet. Br. p. 18) However, before the District Court, the Petitioners' own witnesses contradicted the argument now advanced by the petitioners. The Chief Personnel Psychologist for the State of Connecticut testified that examinations like the one in the present case tend to produce an adverse impact on black candidates because "there are cultural differences in the environment that Connecticut has, that just about every state in the Union has, that give minority candidates a lesser opportunity for a solid education, a lesser opportunity at just about anything that involves what white — your white middle class people have — had the privilege of having for a hundred years." (Tr. 353, 354 (May 28, 1980)).

Similarly, Dr. Joel Peter Wiesen, the head of test development and validation for the State of Massachusetts, who was called as an expert witness for the petitioners, testified that the examination used in this case would normally produce an adverse impact on black candidates because "we have in this country, going back several hundred years, a history of disparate treatment of minority groups." In his opinion, black Americans have not yet recovered from the effects of slavery, which was a particularly harsh form of slavery in this country, where slaves were deprived of educational opportunities. (Tr. 94 (May 27, 1980)).

These are exactly the same considerations that led this Court to rule illegal the tests in *Griggs* v. *Duke Power Company,* 401

U.S. 424 (1971). The respondents are no less the victims of discrimination than the plaintiffs in *Griggs*.

### D. Petitioners' Appointments Of Candidates From A Promotional Eligibility Pool Formed Solely On The Basis Of The Results Of An Examination That Disproportionately Excluded Black Candidates Is Not Relevant To Respondents' Claims Of Discrimination In Being Excluded From The Promotional Eligibility Pool In The First Instance.

Based on the results of the examination, an eligibility pool, consisting of 239 successful candidates, identifiable as to race, was formed. Of the 239 candidates, 26 or 10.9 percent were black, and 206 or 86 percent were white. From this pool the petitioners, in April of 1980, being more than one year after this action was instituted and only one month prior to the trial on the merits of respondents' claims, made the first appointments from the eligibility pool. The petitioners appointed 46 candidates, of which 11 or 23.9 percent were black, and 35 or 76.1 percent were white. The selection rate of black candidates from the eligibility pool was 42.3 percent as compared to the selection rate of 17 percent for white candidates. The petitioners claim before this Court that these selections were made without regard to a candidate's race or color.

That the petitioners appointed a greater percentage of black candidates than their incidence in the pool of eligibles would statistically command, does not negate the fact that the pool of eligible candidates, from which the appointments were made, was formed solely on the basis of the results of an examination that disproportionately excluded black candidates. The disproportionate selection of black candidates for permanent appointments from those black candidates who gained entry into the eligibility pool by overcoming the discriminatory effects of the test does not remedy the disproportionate exclusion of black candidates from the eligibility pool in the first instance. Regardless of the number of black candidates finally appointed by the petitioners, it remains undisputed that the respondents were

denied entry into the pool of eligible candidates, and thus deprived of promotional opportunities, solely on the basis of an examination that discriminated against black candidates.

The only justification advanced by the petitioners for using the results of this examination without first establishing its job-relatedness, is that in making appointments from the pool of eligible candidates, they selected sufficient numbers of black candidates from the pool so as to offset the disparate impact the examination had on black candidates. But this does nothing to redress the injury that the respondents would suffer in view of the test's disparate impact on black candidates, if, in fact, the test was unrelated to performance on the job, as is claimed by the respondents.

To adopt the position advanced by the petitioners, the Court would be sanctioning a practice that would permit an employer to screen candidates for promotion by use of a discriminatory process, unrelated to the requirements of the job, if, from those candidates who are fortunate enough to pass through that process, the employer weights its final promotional decisions so as to offset the purely numerical disparate impact of the screening process. Title VII has not been, and should not now be, accorded such an interpretation.

> "Permitting the overall selection process result in this case to validate what may be the denial of an employment opportunity to a disproportionate number of black candidates is an expedient that transgresses the purpose of Title VII. Where an employment practice forecloses a disproportionate number of persons in a protected group from a job opportunity, it matters very little to the victimized individuals that their group as a whole is well represented in the group of hirees." *Teal* v. *Connecticut,* 645 F2d 133, (2d Cir. 1981)

See also *League of United Latin American Citizens* v. *City of Santa Ana,* 410 F. Supp. 873 (C.D. Calif. 1976) and *E.E.O.C.* v. *Trailways, Inc.,* 27 FEP Cases 801 (D.Colo. 1981)

**(1). A Disparate Impact Analysis Of Claims Of Racial Discrimination In Violation Of Title VII Focuses On The Exclusionary Effects That Facially Neutral Employment Practices Have On Members Of A Protected Group.**

Commencing with its decision in *Griggs* v. *Duke Power Company,* supra, this Court has been consistent in holding that employment practices which disproportionately *exclude* minority applicants from employment opportunities are presumptively violative of Title VII unless such practices are shown to bear a demonstrable relationship to successful performance of the job for which they are used.

> "Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has — to resort again to the fable — provided that the vessel in which the milk is proffered be one that all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice *which operates to exclude* Negroes cannot be shown to be related to job performance, the practice is prohibited." *Griggs* v. *Duke Power Company,* supra, at p. 431. (Emphasis supplied)

The Court used the following language in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802, fn. 14 (1973) in addressing the question of what devices may properly be used to test qualifications for employment:

> "We note that the issue of what may properly be used to test qualifications for employment is not present in this case. Where employers have instituted employment tests and qualifications with an *exclusionary*

> *effect* on minority applicants, such requirements must be 'shown to be a demonstrable relationship to successful performance of the jobs' for which they were used..." (Citations omitted.) (Emphasis supplied)

The Court went on to explain its holding in *Griggs,* supra.

> "But *Griggs* differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, *operated to exclude many blacks who were capable of performing effectively in the desired positions. Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives..." *McDonnell Douglas Corp.* v. *Green,* supra at 806 (Emphasis supplied)

And again in *International Brotherhood of Teamsters* v. *United States,* 341 U.S. 324, 348, 349, the Court stated that:

> "[t]he primary purpose of Title VII was 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens'...To achieve this purpose, Congress 'proscribe[d] not only overt discrimination but also practices that are fair in form but *discriminatory in operation*'...Thus, the Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group..." (Citations omitted)

See also the concurring opinion of Justice Marshall in *Furnco Const. Corp.* v. *Waters,* 438 U.S. 567, 583, (1978):

> "Where the Title VII claim is that a facially neutral employment practice actually falls more harshly on one racial group, thus having a disparate impact on that group, our cases establish a different way of proving the claim...As set out by the Court in *Griggs* v. *Duke Power Company,* supra, to establish a prima facie case on a disparate impact claim, a plaintiff need not show that the employer had a discriminatory intent but need only demonstrate that a particular practice in actuality 'operated to exclude Negroes'..." (Citations omitted)

And see also the dissenting opinion of Justice White in *New York City Transit Authority* v. *Beazer,* 440 U.S. 568, 598 (1979):

> "In a disparate impact hiring case such as this, the plaintiff must show that *the challenged practice excludes members of a protected group* in numbers disproportionate to their incidence in the pool of potential employees..." (Emphasis supplied)

Also in *Dothard* v. *Rawlinson,* 433 U.S. 321, (1977) the Supreme court ruled that the statutory height and weight requirements for employment as a correctional counselor with the Alabama Board of Corrections were violative of Title VII in that these requirements worked disproportionately to exclude women from eligibility for employment. Although these facially neutral employment standards were but two of various eligibility requirements, id at p. 327, the Court focused on the exclusionary effects of the height and weight requirements in ruling that they were violative of Title VII.

> "The gist of the claim that the statutory height and weight requirements discriminate against women does not involve an assertion of purposeful discriminatory motive. It is asserted, rather, that these facially neutral qualification standards work in fact disproportionately to exclude women from eligibility for employment by

> the Alabama Board of Corrections." *Dothard* v. *Rawlinson,* supra at p. 328, 329.

As in the present case, the facially neutral qualification standards in *Dothard* constituted a pass-fail barrier which disproportionately excluded members of a protected class from eligibility for employment. The controlling statistics were those that demonstrate the disproportionate exclusion of women from eligibility for employment. Once the plaintiffs established this disproportionate effect, a prima facie case of employment discrimination was proved and it became the defendants burden to establish business necessity. *Dothard* v. *Rawlinson,* supra.

The decision of the Court of Appeals takes cognizance of this Court's prohibition on the use of selection devices that have an exclusionary effect on black candidates where such devices cannot be shown to be job-related. Whereas, the bottom line theory advanced by the petitioners totally ignores the exclusionary effect the examination had on black candidates seeking entry into the promotional eligibility pool, it was this awareness that led the Court of Appeals to hold that the respondents established a prima facie case of racial discrimination, and not merely because it preferred the use of selection devices that rely on cumulatively scored components to those that rely on components which act as individual pass-fail barriers.

### (2). Title VII Is Concerned With The Protection Of *Individuals* From Unlawful Discrimination.

As noted by the Court of Appeals, the bottom line theory in the context of this case would wrongfully overlook the rights of individuals in favor of the rights of "faceless groups."

> "Where, however, an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process, a different result must obtain. Otherwise we would be adopting the position that regardless of the

> language of the statute Congress intended Title VII to protect faceless groups rather than individuals..." *Teal* v. *Connecticut,* supra at p. 138.

Such an approach would run counter to the fundamental principle underlying Title VII, that is, equality of treatment for individuals. It was for the purpose of protecting the rights of individuals from unlawful discrimination that Title VII was enacted.

> "The statute makes it unlawful 'to discriminate against any *individual* with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin.' 42 U.S.C. Section 2000e-2(a)(1) (emphasis added) The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class...Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes..." *City of Los Angeles* v. *Manhart,* 435 U.S. 702, 709 (1978)

Although a "disparate treatment" case, the language employed by the Court in *Furnco Const. Corp.* v. *Waters,* supra at p. 579 is equally applicable to the present case.

> "A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.***It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force. See *Griggs* v. *Duke Power Co.,* 401 U.S. at 430; *McDonald* v. *Sante Fe Trail Transportation Co.,* 427 U.S. 273, 279 (1976)."

**(3). The "Bottom-Line" Theory Misconstrues This Court's Holding In *Griggs* v. *Duke Power Company*, Supra.**

This case, as did *Griggs*, concerns the legality under Title VII of an "employment test." In *Griggs*, supra the Court held that

> "Title VII forbids the use of *employment tests that are discriminatory in effect* unless the employer meets 'the burden of showing that any given requirement [has]... a manifest relation to employment in question.'" *Albemarle Paper Company* v. *Moody*, supra at p. 425 (Emphasis supplied)

The Court based its decision on its reading of the testing provision of Section 703(h) of Title VII, which specifically concerns the legality of employment tests.

> "In *Griggs*, the Court was construing 42 U.S.C. Section 2000e-2(h), which provides in pertinent part that it shall not 'be unlawful employment practice for an employer to give and act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.'" *Albemarle Power Company* v. *Moody*, supra, at p. 425 fn 21.

The fact that an examination may be one component of a multiple component selection process does not change the requirements of Section 703(h). Section 703(h) does not permit the use of discriminatory employment tests. If an examination produces a disparate impact, then under Section 703(h), it must be shown to be job related.

> "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is the giving of these devices

> controlling force unless they are demonstrably a reasonable measure of job performance." *Griggs,* supra at p. 436.

The petitioners argue that the following language from *Albemarle Paper Company* v. *Moody,* supra at p. 425

> "This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination — has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants."

represents this Court's sanctioning of the bottom-line theory. But this language must be read in the context it was used, which was in reference to the holding in *Griggs,* supra. It states no more than that before an employer is required to prove the job-relatedness of an employment test, the complaining party must first establish a prima facie case, i.e. the *test* has in fact produced discriminatory results. There is no basis to construe this language as meaning the discriminatory results of an employment test are to be countenanced, regardless of the test's job-relatedness, because the overall selection procedure, consisting of what may be other non-testing components, produces no disparate results. Such a view loses sight of the fact that it is a specific section of Title VII, Section 703(h), that requires the examination portion of the selection procedure to be job-related, if that examination discriminates in effect.

## II.

## EVEN ASSUMING THAT UNDER A GIVEN SET OF CIRCUMSTANCES THE SO-CALLED "BOTTOM LINE THEORY" POSSESSES THEORETICAL VALIDITY THIS IS NOT AN APPROPRIATE CASE FOR ITS APPLICATION.

### A. The Present Case Does Not Involve A Multiple Component Selection Process.

The present case involves a selection procedure employed by the petitioners to determine promotional eligibility which procedure consisted of a single component, the test in question. This is not a case challenging a single component of a multiple component selection process. See e.g. *Williams* v. *City of San Francisco,* 483 F. Supp. 335 (N.D. Calif. 1979) Concern about fragmenting a multiple component selection process into its various sub-components is not present in this case. The selection process involved a written test and the discretionary selection by the petitioners of individuals from those candidates who passed the test. There was no other component for determining eligibility other than the examination. Although petitioners testified at trial that in making the final selections they considered past work performance, supervisor's recommendations and to a lesser degree seniority, as well as applying an affirmative action program, these considerations cannot be viewed either cumulatively as a separate component, or individually as various components, of a multiple component selection process.

### B. Petitioners' Final Selections Were Made In The Face of Litigation And Do Not Relieve Them Of Liability To The Respondents.

#### 1. Petitioners' Motivation In Making Their Final Selections Is Suspect In View Of The Timing Of Such Appointments.

The petitioners' motivation in making their final selections from the eligibility pool must be regarded with skepticism in

view of the timing of such appointments. Although they were under no restraint, be it by Court order or by agreement between the litigants, (See P. 3, 4, supra) prohibiting them from making promotions, the petitioners refrained from making any appointments for more than one year after this action was commenced. It was only when trial on the merits was imminent (approximately one month prior to trial) that the petitioners made their first appointments.

Taken alone, the timing of petitioners' appointments would not support a finding that their action was taken in the face of litigation, but together with the evidence discussed infra, this is the only reasonable conclusion that can be reached.

**2. Petitioners' Selection of Candidates Was Not Made Pursuant To An Affirmative Action Program.**

Before the District Court and the Court of Appeals the petitioners argued that they utilized an affirmative action program to insure a large representation of minority candidates in the supervisory sphere. (See p. 5, supra). The clear implication of their arguments was that some type of relief was given by the petitioners to black candidates pursuant to an affirmative action plan or program in order to erase the disparate impact the examination had on black candidates. However, before this Court, the petitioners retreat from this claim, and instead, now make the claim that it must be presumed that the successful candidates were promoted on the basis of merit and qualification, without regard for race or color. (Pet. br. p. 4, fn 1) Indeed, they take exception with the statement made by the Court of Appeals that the petitioners employ an affirmative action program "to insure a large representation of minority candidates on the supervisory level." *Teal* v. *Connecticut,* supra at p. 135. But this is the very language used by the petitioners in making their claims before both the District Court and the Court of Appeals.

From their retraction, it is evident that no relief, pursuant to an affirmative action program in effect at the time of these appointments, was given by petitioners to black candidates, although, as discussed infra, the State did in fact weigh its appointments in this case to favor black candidates contrary to petitioners' assertion that these appointments were made without regard to color or race.

### 3. Color Was Made A Consideration By The Petitioners In Determining The Final Selections.

The petitioners' claim that the successful candidates were promoted without regard for race or color is clearly contrary to the facts involved in this case, which establish that the color of the candidates was considered in making the present appointments. First, the gross disparity between the selection rates of white candidates from the eligibility pool (17%) as compared to that of the black candidates (42.3%) alone would be sufficient to show that the final selections did not occur by random chance. (See pp. 4, 12, supra) Secondly, the testimony elicited at trial also establishes that considerations of color were involved in the final selections. (Tr. 238, 248 (May 27, 1980)) And thirdly, petitioners' briefs to the District Court and the Court of Appeals must be viewed as an admission to the fact that the color of the candidates was considered in making their final selections, although, as now admitted by the petitioners, not pursuant to any plan or program of affirmative action.

### 4. Petitioners' Final Selections Were Made Merely To Avoid Liability To The Respondents In This Case.

Based upon the timing of these appointments and the fact that they were weighted so heavily in favor of the black candidates who entered the eligibility pool, the only reasonable conclusion that can be reached is that the petitioners made these appointments in the face of litigation in an effort to extinguish respondents' claims of discrimination. The petitioners cannot

seriously dispute that black candidates were given preference over white candidates in the final selection decisions. Since this preference was given not as a result of a program of affirmative action, no other plausible reason exists for such preferential treatment other than that it constituted a last minute effort by the petitioners to avoid liability in this case. There can be no other conclusion, based on the evidence before the Court, that the appointment decisions made by the petitioners were inspired by the instant suit. As such, they do not relieve the petitioners of liability to the respondents. See *United States* v. *Oregon Medical Society,* 343 U.S. 326, 333 (1952); *Teamsters* v. *United States,* 431 U.S. 324, 341-342, (1977); *E.E.O.C.* v. *Local 14, Intern. Union of Op. Eng.,* 553 F2d 251, 254 (2d Cir. 1977); *James* v. *Stockham Valves and Fittings Co.,* 559 F2d 310, 325 (5th Cir. 1977).

### C. Because The Petitioners Knew Beforehand That The Test Grade Selected As A Cut-Off Score Would Disproportionately Exclude Black Candidates, They Are Required To Prove The Tests's Job-Relatedness Regardless Of The Racial Composition Of Their Final Selections.

The petitioners claim that extensive preparation went into the construction of the examination in question. However, during the test construction phase no effort was made to determine an appropriate cut-off score for the examination. Even as of the date the test was given, a cut-off score had not been selected. The passing score was left undetermined until after the tests of the individual candidates had been corrected and scored. Thereafter, petitioners selected a cut-off score knowing beforehand that the score they chose would eliminate a disproportionate number of black candidates from promotional eligibility. Under such circumstances, the petitioners are required to prove the business necessity of the test. For if the test is not job-related, then clearly it has been "used" to discriminate against black candidates in violation of Section 703(h) of Title VII.

## III.

## SECTION 703(h) OF TITLE VII DOES NOT RELIEVE THE PETITIONERS OF LIABILITY TO THE RESPONDENTS WHOSE CLAIMS OF DISCRIMINATION ARE BASED ON PETITIONERS USE OF A DISCRIMINATORY EXAMINATION.

### A. Having Failed To Raise The Claim That The "Merit System" Clause Of Section 703(h) Of Title VII Relieved The Petitioners Of Liability In This Case Either Before The District Court, The Court Of Appeals, Or In Their Petition For Certiorari, The Petitioners Cannot Now Raise This Issue For The First Time Before This Court.

Absent exceptional circumstance, issues not raised before the District Court or the Court of Appeals will not be considered on review by the Supreme Court. *United States* v. *Estate of Donnelly,* 397 U.S. 286, 295 fn 5 (1969); *Neely* v. *Martin K. Eby Construction Co.,* 386 U.S. 317, 331 (1967). The issue now raised by the petitioners concerning the effect of the "merit system clause" of Section 703(h) of Title VII had not been previously raised either before the District Court or before the Court of Appeals. Further, this issue was not raised in their petition for certiorari, in which the only question presented by the petitioners concerned the so-called "bottom-line theory." And it is only in the most exceptional of cases that the Court will consider issues not raised in the petition for certiorari. *Stone* v. *Powell,* 428 U.S. 465, 482 fn. 15 (1976); *United States* v. *Ortiz,* 422 U.S. 891, 899.

### B. A Promotional System That Relies On The Results Of A Discriminatory Examination For Determining Eligibility Cannot Be Considered A "Bona-Fide Merit System" Within The Meaning Of Section 703(h) Of Title VII.

The first sentence of Section 703(h) is comprised of two major clauses, the first dealing with bona fide seniority and

merit systems, the second dealing with professionally developed ability tests. Under the second or "testing" clause of Section 703(h), action based on the results of employment tests may not lawfully be "used to discriminate." Ever since this Court's decision in *Griggs* v. *Duke Power Co.*, supra, it has been clear that testing practices are judged by their impact. Proof that an examination produces a disparate impact adversely affecting black candidates is sufficient to make out a prima facie case of discrimination. *Griggs* v. *Duke Power Co.*, supra; *Albemarle* v. *Moody*, supra; *Teamsters* v. *United States*, supra; *Dothard* v. *Rawlinson*, supra.

Nevertheless, petitioners contend that the procedure for determining promotional eligibility on the basis of the results of an examination is a "bona fide merit system" which is protected by the first clause of Section 703(h) regardless of the impact, unless the system was used with intent to discriminate. But under respondents' reading of Section 703(h) the first clause of Section 703(h) would swallow up the meaning of the second clause which explicitly forbade the *use* of testing results to discriminate.

The bona fides of a merit system must be judged by applying the *Griggs* impact and job-relatedness standards. *Guardians Ass'n of New York City* v. *Civil Serv.*, 633 F2d 232 (2d Cir. 1980); *Dickerson* v. *United States Steel Corp.*, 472 F.Supp. 1304 (E.D.Pa. 1978); *League of United Latin American Citizens* v. *City of Santa Ana*, 410 F. Supp. 873, 910 n.28 (C.D.Cal. 1976)

> "Once it has been determined that an examination has a disproportionate impact on minority groups and that it is not job-related, one cannot logically characterize a system of hiring solely on the basis of the results of the test as a 'merit' system — for whatever the test does measure it does not have merit; it does not measure fitness for the job in question, which is surely the only logical meaning of the term 'merit' in the hiring context. Section 703(h) makes sense only if the term 'bona

> fide merit system' is understood to refer to merit in areas related to the necessities of the business, not 'merit' in the abstract..." *Guardians Ass'n of New York City* v. *Civil Serv.*, supra at p. 253.

In the present case, respondents have already proved the results of the promotional test had a disparate impact on black candidates. If, after further proceedings, the test is ultimately determined not to be job-related, it cannot then seriously be claimed that the examination, which does not measure "merit," is part and parcel of a bona fide merit system.

## CONCLUSION

For the reasons discussed, the holding of the Court of Appeals should be affirmed and this case be remanded to the District Court for further proceedings consistent with the decision of the Court of Appeals.